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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977
No. 76-1307

NAVAJO FREIGHT LINES, INC., a corporation,
Petitioner,

vs.

VACCO INDUSTRIES, a California corporation,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeal, Second Appellate District, State of California.

BRIEF IN OPPOSITION.

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BRIEF IN OPPOSITION.

INTRODUCTION.

This petition for writ of certiorari to review a decision of the court of appeal, second appellate district, State of California, is prosecuted by Navajo Freight Lines, Inc., as petitioner and defendant in the trial court below. The California superior court proceeding was initiated by Vacco Industries, a California Corporation, as party plaintiff. The cause of action sued upon has as its statutory authority the Interstate Commerce Act, and amendments thereto. This is commonly known as Section 20, paragraph (11) and is cited as Title 49 USCA 20, paragraph 11. This provides that the initial or the delivering carrier shall be liable to the lawful holder of a bill of lading for any loss, damage,

or injury to the property caused by it. Although the Carmack Amendment is found in Part I of the Interstate Commerce Act and originally applied to railroads and certain inland water carriers, Part II of the Interstate Commerce Act which was the Motor Carriers Act of 1935 incorporated this section by Section 319 thereof, the citation thereof being 49 USCA Section 319.

The theory of the respondent in the trial court was that Navajo Freight Lines, Inc. accepted from Vacco Industries a certain sophisticated piece of machinery for shipment in interstate commerce. This case was tried to the court, sitting without jury, wherein it was alleged and proved that Navajo Freight Lines, Inc. failed in its responsibility as a common carrier to deliver the consigned machinery to its point of destination in an undamaged condition, all of which was to respondent's loss and damage in the sum of $75,217.86. The court allowed $54,241.95 as cost of repair, $16,837.60 as prejudgment interest, and $4,-138.31 to the prevailing party as costs of suit.

The trial court decision was affirmed by the district court of appeal on October 29, 1976. A petition for rehearing in the same court was denied November 18, 1976. The petitioner then sought a hearing de novo in the California Supreme Court. That petition was denied December 22, 1976. The instant petition for certiorari followed.

OPINION BELOW.

The judgment of the court below is printed in Appendix to Petition for Writ of Certiorari to the Court of Appeal, Second Appellate District, State of California.

JURISDICTION.

Petitioner invokes jurisdiction of the Supreme Court of the United States under 28 U.S.C. § 1257(3), and Supreme Court Rule 19.

Respondent objects to the jurisdiction of the Court on the grounds that the decision sought to be reviewed presents no substantial federal question.

"1257. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties or statutes of or commission held or authority exercised under, the United States."

The petitioner makes the bald statement that jurisdiction is invoked under 28 U.S.C. § 1257(3), but it makes no showing or argument in support thereof. The failure of the petitioner to present with accuracy, brevity and clearness whatever is essential to show jurisdiction is a sufficient reason to deny the petition.

Sound judicial discretion calls for a denial of jurisdiction. A review on writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefor. Supreme Court Rule 19(1).

Sound judicial discretion calls for a denial of jurisdiction because the decision of the State Court is not contrary to the decisions of the Supreme Court.

Harmonious state-federal relations are enhanced when this Court rejects review of a state court's decision on matters of peculiarly local concern.

The petition fails to demonstrate any reasons why this Court should undertake such a task that more fittingly belongs in a trial court.

The jurisdiction of the Supreme Court to review the proceedings of state courts is not that of a reviewing court on appeal, but is limited to the specific instances of denials of federal rights. *Waters-Pierce v. Texas,* 212 US 86, 53 L ed. 417; before the Court will entertain jurisdiction to review a judgment of a state court, is must affirmatively appear from the record that a real and substantial federal question was involved in the decision of the state court. Where the judgment of the state court rests upon two grounds, one of which is federal and the other nonfederal in character, the Supreme Court is without jurisdiction to review if the nonfederal ground is independent of the federal ground and adequate to support the judgment. *Minnesota v. National Tea Co.,* 309 US 551, 84 L ed. 920.

The Supreme Court will decline to review state Court judgments which rest on independent and adequate state substantive or procedural grounds, even where those judgments also decide federal questions. *Henry v. Mississippi,* 379 US 443, L ed. (2d) 408. The Supreme Court has ruled that the record must affirmatively demonstrate that the federal question was decided and that the decision was essential to the disposition of the case. *Buck v. California,* 343 US 99, 96 L ed. 775. The Supreme Court will not assume jurisdiction where it is at most conjectural whether the petitioner will be deprived of any constitutional right. *Abrams*

v. Van Schaick, 293 US 188, 79 L ed. 278. The general principle that appellate review is ordinarily limited to a determination whether there has been error at law, the trial court's decision of questions of fact being taken as conclusive in most circumstances is applicable to review by the Supreme Court. *Bandini Petroleum Co. v. Superior Court,* 284 US 39, 76 L ed. 136.

Applying the foregoing principles, it is clear that the petition now before the Court presents no substantial federal question. The petitioner would have this Court re-examine the rule of presumed negligence in motor-carrier cases. The rule is abundantly clear and requires no further explanation or pronouncement. At best, the petitioner disagrees with the trial court's assessment of the evidence. By the very questions raised in the petition, it is clear that issues of fact, not law, have been determined adversely to the petitioner. The evidentiary effect of presumptions, weight of expert testimony, and the quantum of damages are the factual questions raised by the petitioner. These very issues were decided on an independent, nonfederal basis which requires no review by this Court. This Court has spoken repeatedly on carrier liability under the Carmack Amendment. The ruling of the California district court of appeal is in accord with the decisions of this Court. Accordingly, the petition should be denied for lack of jurisdiction.

QUESTIONS PRESENTED.

Respondent disputes petitioner's recitation under Questions Presented. If the Court accepts jurisdiction, the issues succinctly stated are:

1. To what extent does the presumption of negligence apply in an interstate carrier case when a clear receipt is given by the consignee, where there is rehandling by the consignee prior to uncrating, but in the face of substantial evidence that the consignee exercised due care for the consigned property, and that the same was not damaged by the consignee?

2. Did the respondent establish a prima facie case of carrier liability?

3. By way of procedural matters, may the petitioner claim prejudice and discount its own expert who testified on cross examination that the damage to the consigned property occurred in transit and prior to delivery to the consignee?

4. Was the shipment properly prepared for shipment in view of the carrier's recommendations for crating and the carrier's acceptance of the property for shipment in interstate commerce?

5. Did the trial court judge properly assess and apportion damages against the interstate common carrier?

STATEMENT OF CASE.

For the sake of brevity, Navajo Freight Lines, Inc. and Vacco Industries, a California Corporation, will be referred to in the body of this brief as "Navajo" and "Vacco," respectively. The petitioner correctly states that six depositions of Anthony Zangari, William Lipscomb, Joseph Rega, Gerald Raymond, Rolland F. Hall and Stephen P. Grace were read in their entirety by the trial judge, and received in evidence as the court's Exhibit #1 [Rptr. Tr., p. 1, lines 10-28], pursuant to stipulation between counsel. These six depositions were taken with the prospect that the deponents

would not personally testify at time of trial, and that the trial Court would solely rely upon the import of the deposition transcripts in lieu of such testimony. The six depositions are important in that five of the six deponents worked or resided in proximity to Providence, Rhode Island, which was the point of destination of the consigned shipment. Each deponent, to some degree has personal knowledge as to the condition of the machinery, upon, and after it arrived at its point of destination, Naval Air Station, Quonset Point, Rhode Island.

Vacco entered into a written contract with the United States Navy for the design and fabrication of a "Lube Pump Test Stand" [Rptr. Tr., Vol. I, p. 128, line 11, to p. 129, line 3]. After award of contract, Vacco proceeded to discharge its contract obligation in accord with plans and specifications furnished by the United States Navy [Rptr. Tr., p. 216, lines 23-28, incl.]. The actual contract performance was rendered between 1968 and 1970 [Rptr. Tr., p. 8, lines 6-11]. The unit was completed in the fall of 1970, and was to be shipped to the Naval Air Station, Quonset Point, Rhode Island.

To secure transportation for the consigned test stand, Vacco had its shipping foreman, Manuel Perry, contact Navajo, a motor freight common carrier in interstate commerce. In that regard, Manuel Perry personally spoke with Lawrence Richardson, a sales and traffic representative for Navajo [Rptr. Tr., p. 10, line 7].

Mr. Lawrence Richardson made two visits to Vacco to view the consigned merchandise, and to review and make recommendations as to how the machinery should be crated and prepared for interstate travel [Rptr. Tr., p. 400, lines 2-7]. Richardson had 10 years experience in shipping and knew about the sufficiency of crating for interstate travel [Rptr. Tr. p. 415, line 23]. He recommended that the units be bolted to heavy wooden skids [Rptr. Tr., p. 401, lines 3-6], and stated that the crates were otherwise satisfactory [Rptr. Tr., p. 404, lines 6-9]. In essence, Richardson saw no shipping hazard [Rptr. Tr., p. 435, lines 2-8]. Had Navajo required other internal or external packing requirements, he would have pointed them out to Manuel Perry [Rptr. Tr., p. 428, lines 4-10]. Moreover, Navajo had the absolute right to reject such shipment if Richardson deemed it inadequate [Rptr. Tr., p. 415, lines 16-19].

The Lube Pump Test Stand did comply with the Naval specifications, and as built and prepared for shipment, could withstand the normal hazards of shipment [Rptr. Tr., p. 216, lines 23-28]. Richardson had discussions with Perry to the effect that the transportation would be made on a single truck [Rptr. Tr., p. 13, lines 2-5], which would be reserved exclusively for Vacco to the exclusion of other goods not forming the subject matter of the bill of lading [Rptr. Tr., p. 68, lines 2-4]. Perry told Richardson that Vacco did not want the machinery transferred from truck to truck during the course of transit to the East coast [Rptr. Tr., p. 62, lines 16-24], and Richardson guaranteed Vacco that this would not occur [Rptr. Tr.,

p. 65, lines 21-24; p. 412, lines 18-26]. Richardson visited the premises of Vacco on two occasions and observed the completed Lube Pump Test Stand. The skids and crating were observed by Richardson, who stated that each was sufficient to withstand the anticipated interstate transportation [Rptr. Tr., p. 13, lines 25-28]. Richardson did suggest that additional nails be placed in the crating. This was done [Rptr. Tr., p. 15, lines 7 and 8]. Manuel Perry personally observed the three units of the Lube Pump Test Stand being bolted to the skids [Rptr. Tr., p. 18, line 3]. Perry testified that the machinery was in "as new" manufactured condition, and showed no evidence of any damage [Rptr. Tr., p. 20, lines 23-24; p. 21, line 1-6].

Once the units were bolted to the skids, they were not moved prior to being received by the carrier's agent of September 25, 1970 [Rptr. Tr., p. 56, lines 11-13; p. 26, lines 23-27]. The actual bill of lading [Clk. Tr. p. 235] was prepared by Manuel Perry [Rptr. Tr., p. 24, lines 11-13]. Because the Lube Pump Test Stand was one of a kind, and possessed substantial inherent value, Lawrence Richardson, as agent for Navajo, advised Perry to place a "declared value" of $130,000.00 on the face of the bill of lading [Rptr. Tr., p. 60, lines 2-7]. This would insure careful handling in transit. The carrier acknowledged that it knew that Vacco placed great value upon the machinery by reason of the high declared value [Rptr. Tr., p. 420, lines 8-22]. On, or about, September 25, 1970, the truck driver for Navajo receipted the consigned articles, but questioned the declared value as excessive. Thereafter, after checking with Navajo, he proceeded to complete the bill of lading and signed it. The three

crates which were skidded, and one wooden box weighing a total of 11,760 pounds were loaded by Vacco employees onto a flatbed truck dispatched by Navajo. Representatives of Navajo and Vacco observed the entire loading process and observed no damage to the skids, crating or contents [Rptr. Tr., p. 23, lines 25-27]; the entire loading procedure was uneventful with no damage occurring at that time [Rptr. Tr., p. 26, lines 11-19; p. 57, lines 7-13]. The bill of lading signed by Henderson on behalf of Navajo indicated that goods were receipted without exception and found to be in apparent good order [Clk. Tr. p. 242].

The shipment was to be expedited by Navajo which meant that the merchandise would be delivered as fast as possible by the delivering carrier [Rptr. Tr., p. 431, lines 4-13]. Thereafter, the flatbed truck left Vacco and proceeded to the Los Angeles terminal of Navajo. The three wooden crates and one wooden box were shipped, two pieces on van trailer, A4352 to Cleveland, one piece on van trailer, A4113 to Cleveland, and one piece on van trailer, A4091 to Cleveland. At Cleveland, the four pieces were loaded on van trailer 1262 and delivered to Quonset Point, Rhode Island [Clk. Tr. pp. 248-252]. During the course of transit, the consigned merchandise was then offloaded and rerouted on separate vehicles at least on three occasions.

The shipment in question arrived at the Naval Air Station, Quonset Point, Rhode Island on, or about October 5, 1970, Joseph Rega, inspector for the Naval Air Station observed the receipt of the shipment and observed the presence of the damages skids [Clk. Tr.

p. 47, line 5, to p. 48, line 2]. From evidence advanced at the time of trial, it was determined that the shipment arrived and was accepted by the Naval shipping clerk, without exception as to the external condition of the packing materials [Court's Ex.—Deposition W. Lipscomb pp. 81-87]. During the course of the depositions, William Lipscomb was asked whether or not exception would have been taken, given the condition of the skid as evidenced by a series of exhibits denoted as Exhibit "F" 1-16. Lipscomb testified in all probability that he would not have taken exception to the condition of the wooden skids. It should be noted that Anthony Zangari, the delivering driver for Navajo, observed that no damage occurred during the unloading process. After the shipment was left on the receiving dock, it was moved by Navy personnel to Building 880, which was situated several hundred yards from the initial point of delivery. Joseph Rega, an employee of the Navy, testified that the shipment was observed by him at the time of its initial delivery, and subsequent delivery to Building 880. It is significant that only Rega testified as to the care and custody of the consigned property after arrival at the Naval Air Station, Quonset Point, Rhode Island. He stated, without reservation, that the merchandise was carefully handled by Naval personnel under his supervision. He states in his deposition that no damage to the consigned goods occurred while the same was in the possession of the Navy [Court's Ex.—Deposition of Joseph Rega].

Petitioner acknowledges such testimony at page 13 of Appellant's Opening Brief, lines 1-6. While appellant attempts to argue that the consigned property was damaged while in the custody of the United States

Navy, no witness testified that such was the case. In fact, the weight of testimony was that the merchandise was damaged while in transit and before delivery to the Naval Air Station in Rhode Island. No less than four persons testified at trial that the damage occurred in transit after it left California, and prior to arrival in Quonset Point, Rhode Island.

In the course of events, Vacco was contacted in California and advised of the damaged condition of the Lube Pump Test Stand [Rptr. Tr., p. 95, lines 20-28]. The United States Navy advised that two of the four units were badly damaged [Rptr. Tr., p. 96, lines 1-18], and thereafter, the Navy formally rejected said consigned property on October 16, 1970 [Clk. Tr. pp. 221-224, and pp. 167-169].

Vacco then directed one Steve Buchanan to fly to Rhode Island to examine the damaged consignment. In conjunction therewith, Mr. Buchanan prepared a "lube pump test stand" damage report, dated October 14, 1970 [Clk. Tr. pp. 167-169]. The observations of Mr. Buchanan, and Naval photographs [Ex. "F" 1-16] clearly show that the test stand had been dropped somewhere in transit prior to arrival in Rhode Island. Interestingly enough, Navajo offered no evidence of the care used by its drivers during the course of transit. Local pickup manifests and line driver logs were available, but petitioner did not produce them at the trial [Rptr. Tr., p. 428, lines 11-21; p. 443, line 14, to p. 444, lines 1-5].

The Navy then recrated the damaged Lube Pump Test Stand and the same was returned to California for repairs at the Vacco facility, located in El Monte, California. At the request of Navajo, Vacco accumu-

lated its costs while the repair work was in progress [Rptr. Tr., p. 270, lines 1-21; Clk. Tr. p. 217, paragraph 7].

A formal claim was made in accordance with Section 2(b) of the Uniform Straight Bill of Lading. The claim was declined by Navajo, and suit was filed on November 2, 1972. At the time of trial, Vacco adduced proof that the reasonable cost of repair was $54,241.95, along with pre-judgment interest and costs of suit.

REASONS FOR DENYING THE WRIT.

a. The Decision of the Trial Court Rests Upon an Independent Nonfederal Basis.

The complaint initially filed in this matter contained multiple causes of action. One of the causes of action was pled in negligence [Clk. Tr. p. 1]. In most interstate carrier cases, it is impossible to establish negligence in that the act complained of most always occurs out of the presence of the person shipping the property. For this reason, the Carmack Amendment was passed as an amendment to the Interstate Commerce Act. The amendment presumes negligence when the shipper establishes the following: the shipper establishes his prima facie case when he shows delivery in good condition, arrival in damaged condition, and the amount of damages. 49 U.S.C.A. § 20(11).

In this case there was abundant direct evidence of negligence without resort to the above statutory presumption. The direct evidence established by expert testimony was that the consigned property was dropped by the petitioner while in transit, and under petitioner's care, custody and control. The court concluded that the petitioner was negligent in that regard. Petitioner makes much of the presumption of negligence arising out of the Carmack Amendment. While the court was convinced that the presumption was established, the record is replete with direct evidence of negligence. The findings of fact and conclusions of law demonstrate that this was the case [Clk. Tr. p. 13].

The petitioner further claims that respondent failed to establish a prima facie case of carrier liability. The record on appeal demonstrates that the respondent had proven the following elements of its case by the

time it rested as to the case in chief: Good condition of the property upon receipt by the carrier; negligent handling of the property while in transit; damaged condition of the property upon delivery; and damages proximately caused. The respondent was required to prove nothing further to avoid a judgment of nonsuit (California Code of Civil Procedure § 631.8) in favor of the petitioner. Thus, the decision of the trial court was supported by an independent nonfederal basis. Despite assertions to the contrary, there is no need for this Court to re-examine the rule of presumed negligence on the part of the carrier. This is but an evidentiary device available to claimants wherein negligence cannot be established by direct testimony.

b. The Evidentary Rulings of the Trial Court Were Correct and Supported by Substantial Evidence.

If petitioner takes the position that the presumption of negligence should not have been applied by the trial court, it does so on the mistaken assertion that a prima facie case had not been established. Obviously, the petitioner contends that the clear receipt given by the receiving clerk precludes the application of the presumption in that the damaged condition of the property upon delivery could *never* be established. The clear receipt is only prima facie evidence that the contents of the crates were in good condition, because no written exceptions to condition at delivery were taken by the consignee. Like any other receipt, the facts may be established by the weight of the evidence that the receipt did not properly reflect the actual condition of the goods at the time of delivery. *Railway Express Agency v. Smith*, 212 F.2d 47. One must remember that a presumption is an assumption

of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. California Evidence Code § 600. From the evidence which established negligent handling and damage in the course of transit, along with the evidence that the consignee carefully handled the property without causing damage after receipt, the trial court could, and did, reasonably conclude that the consigned property was in a damaged condition, albeit concealed, when delivered to the consignee. Petitioner had an opportunity to rebut the presumption once it was established. California Evidence Code § 602. Petitioner tried to establish that the damages occurred after delivery to the consignee, or by reason of the way in which the property was prepared for shipment. Further, the petitioner argued the effect of rehandling of the property by the consignee. Despite the efforts made by the petitioner, it was unable to rebut the presumed negligence. The trial judge correctly determined that the shipper and consignee did nothing to cause or contribute to the damage of the consigned property.

Another evidentiary matter concerning petitioner is the subject of expert testimony. Petitioner claims some prejudice by reason of the testimony adduced from the petitioner's expert by respondent's counsel. It is certain that petitioner's theory of the case by defense was greatly impaired by the testimony given by Charles Avery, Ph.D. Doctor Avery testified in effect that the damage to the consigned property occurred in the course of transit and before delivery. Whether the witness was improperly prepared to testify in support of petitioner's theory of the case is unknown, but such testimony did impeach the argument surrounding the clear receipt and was found to be probative by the court.

This testimony was prejudicial to the petitioner's case, but the manner in which it was introduced is in accord with California evidentiary rules.

c. The Damages Assessed Against the Petitioner Are in Accord With the Decisions Interpreting the Carmack Amendment to the Interstate Commerce Act.

The petitioner asserts that the damages sustained by respondent were improperly assessed against it by the trial court. Section 20, paragraph 11, of part I of the Interstate Commence Act (which is applicable to rail and motor carriers and freight forwarders) provides, in part, as follows: "That any common carrier . . . (operating in interstate commerce) . . . shall issue a receipt or bill of lading . . . and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or any common carrier . . . to which such property may be delivered . . . and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier . . . from the liability hereby imposed; and any such common carrier *shall be liable* to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon . . . for the *full actual loss, damage or injury to such property* caused by it or any such common carrier . . ." (Emphasis added).

As stated in the *Atlantic Coast Line Railway Co. v. Roe,* 11 So. 155, "The basic thought underlying the federal statutes which define the liability and prescribe the measure of damages in cases of this kind is that the owner shall be made whole by receiving the proper money equivalent for what he has actually

lost, or, in other words, to restore him to the position he would have occupied, had the carrier performed its contract." How have the Courts interpreted the phrase "full actual loss, damage or injury?" For the sake of argument, it will again be stated that the lube pump test stand was one of a kind, and there was no established market value for the same other than the contract price to be paid by the United States Navy. The Vice President of Vacco testified that the actual cost to Vacco for the fabrication of the unit exceeded the Navy contract price, because the unit was in the nature of a prototype involving much research and development.

Where there is no market value as such, the shipper has often been able to recover on another basis if more appropriate. See *United States v. Palmers and Parker,* 61 F.2d 455; *Baltimore Railway Co. v. Becker Mach. Co.,* 272 Fed. 933. The reasonable cost of repair is an appropriate measure of that loss where the property is not a total loss, but can be, and is repaired, and the cost of repair is not out of proportion to the value of the property. *Continental Can Co. v. Easor Express Co.,* (S.D.N.Y. 1964) 354 F.2d 222. In *Am. Jur., Carriers,* Sec. 783, a summary of the law is given as follows:

> "The contract price, rather than the market value of goods may constitute the proper basis for estimating the damages for their loss or injury where they are shipped under, or pursuant to, a contract of sale. . . . Where the contract price is the only evidence of the market value it should be taken as the measure of damages."

If it is apparent that the shipper would have received a profit without any additional undertaking if the goods had been delivered complete and in good order, then the shipper has *earned* a profit which he is entitled to recover. It should be remembered that a manufacturer by the very process of manufacturing usually produces a product which is valued in excess of its cost of manufacture. Our entire distribution system embraces the selfish motive of profit and usually the movement of commercial goods is for the very purpose of realizing a profit (Emphasis added).

In a good number of cases, the shipper has been allowed a measure of recovery based upon the invoiced sales price to the consignee less applicable discounts. *Illinois Cent. Railway Co. v. Crail,* 281 U.S. 57, 50 S.Ct. 180 (1930); *Meletio Sea Food Co. v. Gordons,* 191 S.W.2d 983 (1946).

It is undisputed in this appeal that in arriving at the true cost of repair, respondent sought recovery for direct costs, direct labor, to which was assessed a burden of 188%, general and administrative expenses, and of course, profit [Rptr. Tr., pp. 276-294]. "Full actual loss" does include the cost of repair and an allowance for operations and overhead. The charge must be determined as each case presents its peculiar circumstances (Emphasis added). *Conditioned Air Corporation v. Rock Island Motor Transit,* (1962) 114 N.W.2d 304. *Process Equipment Co. v. Denver Chicago Trucking Co.,* 275 F.Supp. 698 (1967), also allows direct and indirect costs. The carrier is liable for the reasonable cost of repairing damaged merchandise. This not only includes cost of labor and material but may also include a reasonable amount for *overhead. Olco-*

vich v. Grand Trunk Ry. Co., 176 Pac. 459; *Galveston, H. & S. A. Ry. Co. v. Standard Rice Co.*, 34 S.W.2d 619; *Western Machinery Exchange v. No. Pac. Ry. Co.*, 254 Pac. 248. Other cases have also held that "full actual loss" also includes transportation costs to place of repair and return, together with allowance for depreciation, if any. *Olsen v. Railway Express Agency, Inc.*, 295 F.2d 358 (1961). Moreover, other cases have allowed the shipper to recover from the carrier those expenses incurred in determining marketability and salvage value of products damaged in transit. *Campbell Soup Co. v. Carling Transfer Co.*, 193 F. Supp. 863 (D.C. Ore.).

The Trial Court also awarded pre-judgment interest in the amount of $16,837.60. Such allowance is proper. *Louisiana & Arkansas Ry. v. Export Drum Co.*, 359 F.2d 311; *Fawley Motor Lines v. Cavalier Poultry Corp.*, 235 F.2d 416 (4th Cir. 1956).

Now, in applying these general propositions of law, were the damages as allowed proper under the circumstances of this case? This case is unique in that the Lube Pump Test Stand was not a fungible item of merchandise easily subject to replacement or repair. The test stand was one of a kind, and Navajo was placed on advance notice by the $130,000.00 declaration that the machinery was of tremendous value. Navajo now argues that an application of a burden rate of 188% to direct labor is excessive, along with the general and administrative markup of 35%. There can be no dispute in view of the case law that overhead, in some amount or by some generic description is warranted and allowed in the motor carrier cases.

William Tolley, Vice President of Vacco, testified in chief, as to the record keeping procedures at Vacco. Moreover, he stated that the values allocated to burden (as indirect support to direct labor), along with G and A, and profit were the same under the original contract with the Navy, as with the repair work which commenced in the fall of 1970. It would be incongruous to demand the shipper to perform the repair work at cost and without overhead, when the original construction was priced out differently to the Navy. Petitioner was given the opportunity to challenge the reasonableness of the allocated burden and the percentage of general and administrative expenses claimed. No such testimony was adduced by Navajo. The respondent called one Vincent Page as an expert in the field of government contracts, who cogently testified that the rate assigned to burden, G and A, and profit are consistent with accounting policies customarily employed in government and industry [Rptr. Tr., p. 357, line 12, to p. 359, line 20]. Since the accounting procedures used by Vacco have been employed in literally hundreds of contracts in government and industry, all of which are subject to close audit and control, what evidence was introduced by Navajo that indicates that the rates for these overhead figures was either excessive or unreasonable? While Navajo characterizes the overhead rates as "special damages," no citation to authority or trial testimony supports such a characterization.

As to the 10% profit figure, the same is neither remote nor speculative, especially given the fact that Vacco had been in existence for some period of time and has a history of profit making. See *L. W. Whitlock Truck Service, Inc. v. Regal Drilling Co.*, 333 F.2d 488 (1964) Where loss of profit is the natural probable

consequence of the act or omission complained of, such profits may be recovered if established with certainty. *Meyer v. Buckman,* 7 Ill.App.2d 285; *Kolberg v. Cities Service,* 343 Ill.App. 355.

Moreover, to the extent that the Court would construe any of the damages as "special damages," such damages are customarily granted when the carrier has prior knowledge they are reasonably likely to occur, if the consigned property were damaged in transit. In this case, the carrier was indeed placed on notice as to the special circumstance from which damage would flow, namely, the declared value of $130,000.00 and the request for expedited delivery.

CONCLUSION.

For the foregoing reasons, respondent Vacco Industries, a California corporation, prays that the petition of petitioner, Navajo Freight Lines, a corporation, for a writ of certiorari be denied.

DATED: April 18, 1977

Respectfully submitted,

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